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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 852

JAMES M. FOSTER and JOHN H. JOHNSON, Co-Partners, d/b/a J. M. FOSTER AND COMPANY,
Petitioners,
vs.
CLARENCE H. BUCKNER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 203 F. (2d) 527.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(The Questions Presented are set forth below as in the Petition.)

1. Whether under the Michigan Workmen's Compensation Law in effect June 30, 1949, respondent is barred as a matter of law from maintaining this action.

2. Whether the 1952 amendment of the Michigan Workmen's Compensation Law, Pub. Acts 1952, No. 155, is retroactive.

3. Whether the assumption of risk doctrine as published in the *Restatement of the Law of Torts,* Sec. 466, was correctly stated and applied by the Court of Appeals.

4. Whether the facts related in the opinion of the Court of Appeals are supported in the record.

5. Whether petitioners' motion for a mistrial should be granted.

6. Whether petitioners' motions for a directed verdict of no cause for action should be granted.

7. Whether petitioners' motion for judgment *non obstante veredicto* should be granted.

8. Whether petitioners' motion for a new trial should be granted.

STATEMENT

The Summary and Short Statement of the Matter Involved presented in the Petition misstates and omits many material facts and is, indeed, a statement of the case petitioners would like to have made rather than the case presented by the record. Rather than pick apart each sentence of that Statement respondent has briefly stated the case as it is in the record.

Respondent, Clarence Buckner, and his fellow painter, Roberts, were experienced painters (R. 304, 257) and were using the usual method and equipment. The pick or platform which they used was originally raised into the overhead by the use of the hand line (75-100 feet long) and one rope about 75 feet long, ¾ inch thick. Once in the overhead, the hand line was used only to raise and lower paint (R. 259). In lowering the pick, another ¾ inch rope was used together with the 75 foot rope mentioned above. It was necessary to use 20-30 feet of the 75 foot rope in moving the pick about in the overhead structure (R. 336). The balance of the rope would be tied in a bundle. One of the ¾ inch ropes was attached to each end of the pick. When it was time to move the pick, the painters would hang on to whatever steel member was available, put one end of the rope over a steel member, and by slowly letting out the ropes, lower the pick to some steel beams or other members below. On the occasion in question, after the pick was resting in the lower position, the painters dropped the ropes on to the pick, all the while hanging on to whatever was available. The pick was less than two feet wide and since after being moved the pick was not directly under its former position, the ropes had to be dropped at somewhat of an angle. Frequently the line would not fall entirely on

the pick, but part of it would hang over the edge (R. 266). In lowering the pick just prior to the accident, Mr. Buckner was on the end with the 75 foot rope. Before starting to lower the pick, both men observed the crane which was standing still (R. 264). Respondent thought that the rope fell on the pick but while still up at the old position, hanging to the steel member, he was unable to see whether or not part of it had fallen off the pick on the far side (R. 317). After it was lowered Roberts went down to the pick first. Respondent handed the paint brushes and buckets to him. Respondent then started climbing down a steel truss. The entire procedure took about 6 or 7 minutes. Climbing down took about two minutes. While respondent was climbing down, Roberts was at his end of the pick. He testified that he saw a part of respondent's rope on the pick but did not make sufficient observation to see whether all of it was there or not (R. 168, 185). From the testimony of other witnesses on the ground, it was established that the rope hung below the platform for several minutes prior to the accident. Respondent could not have knocked it off himself since the platform was yanked from under him just as he stepped upon it, after shinnying down from the cross member above. Witness Turner, petitioners' general millwright foreman, saw the rope hanging down while respondent was still climbing down the steel member (R. 211). The crane started up from a position 35 to 200 feet away. The rope was seen by persons on the ground before the crane started up, from 2-5 minutes before the accident. It was urged at the trial that since respondent had not observed the crane just before he started climbing down, he was guilty of contributory negligence. But the crane must have started up after plaintiff had started climbing down. Respondent's general foreman stated that the crane was standing still when he saw Buckner climbing down to the pick just before the accident (R. 216, 217).

Thus the statement in the Petition that Roberts suggested that the rope might have been knocked off by respondent, which was merely a conjecture, was disproved by direct testimony. Petitioners attempt to mislead the court when they place such misstatements in the "Statement of the Matter Involved."

Respondent was working in a proper place where he had been directed to work by his employer (R. 153, 256). He had no opportunity to draw up the rope and to recoil it after gaining the platform, since before he had a chance to do anything the platform was jerked from under him (R. 267-268).

Respondent relied upon several acts of negligence on the part of petitioners. The failure to have a lookout man on the crane was only one of these. The failure to do so was aggravated by the fact that petitioners had had such a lookout or safety man on the crane when their own employees were working in the path of the crane superstructure (R. 245), and by the fact that the trade union stewards had asked that such a safety man be employed (R. 119, 206). Petitioners had refused their request because of the expense involved (R. 206).*

Moreover, it was shown that the usual practice on construction jobs of the type involved here was to have such a safety man (R. 119). Petitioners were further negligent in that the operator of the crane failed to ring the warning bell before starting the crane (R. 93, 94, 116, 154, 169, 132, 265). Finally petitioners' foreman, Leslie Bounds, stated that it was his responsibility to give the signal to start the crane (R. 358) and that before doing so, he was sup-

*Petitioners assert on page 5 of the "Petition" that no lookout man was ever used on the crane. On page 245 of the record one of petitioners' own employees testified that a lookout man had been used on the crane at times. This testimony was never contradicted.

posed to make sure that there was no one working in the path of the crane (R. 352).

He testified that he did observe the painters working above the crane before giving the signal to move, but observed no rope hanging down (R. 352).

Respondent's witnesses, however, testified the rope had been hanging down for from two to five minutes before the crane was moved (R. 92, 105, 211). The jury was entitled to believe the testimony of petitioners' general foreman, R. E. Turner, that the rope was hanging down at least a minute before the crane started up (R. 211).

Petitioners' employee, McMann, saw the rope for a longer period of time (R. 92, 195).

Bounds knew, or should have known, that the operator of the crane could not see up into the superstructure.

The facts relating to the payment of certain hospital and nursing expenses are set forth in the Petition in a misleading fashion. The record supports the statement made in the opinion of the Court of Appeals that "the plaintiff did not know these expenses had been paid by the (insurance) carrier." As is pointed out in respondent's Argument I, in determining the question of election of remedies the court was interested only in the conduct of the respondent up to the time the instant suit was started. Commencement of the instant suit was an election to sue the petitioners, Foster, and respondent was barred from so suing only if he had previously elected to seek compensation. The record shows that at the time the instant suit was started respondent was under the care of three special nurses (R. 271), in bed (R. 270), and in casts (R. 271). The nurses and hospital were paid directly by the insurance carrier and respondent did not know they had been so paid nor had he asked that they be paid (R. 329, 330).

ARGUMENT

I.

DISTRICT COURT AND COURT OF APPEALS PROPERLY HELD THAT RESPONDENT HAD NOT ELECTED TO TAKE COMPENSATION UNDER THE MICHIGAN WORKMEN'S COMPENSATION ACT

Under the Workmen's Compensation Act of Michigan as it was at the time the respondent, Mr. Buckner, was injured required that he elect either to take compensation or to sue Foster & Company, petitioners. Under Michigan law the commencement of the instant suit constituted an election to proceed against petitioners. *Graham v. Motor Freight,* 304 Mich. 136. Prior to its commencement, the compensation insurance carrier had paid certain nursing and hospital charges incurred by respondent, but these were paid directly to the nurses and to the hospital without the respondent's knowledge and at a time when he was unable to get out of bed and was under the care of three special nurses. The Trial Court and the Court of Appeals both held that there was nothing in these circumstances which could be held to constitute an election by the respondent to proceed for compensation. In so holding, the courts were following the only decision of the Michigan Supreme Court which decided this identical point, *Fox v. Detroit United Railways,* 218 Mich. 5. The major changes in the Michigan Workmen's Compensation Act in 1943 did not affect the holding of the Fox case since neither the election of remedies section nor that relating to medical payments were modified by the 1943 changes.

Petitioner asserts that the instant case is in conflict with the decision in *Dinardo v. Consumers Power Company,* 181 F. (2d) 104, C. C. A. 6. The facts in the two cases are

so dissimilar that the cases do not invite comparison. The decision in that case was written by the same judge, Florence Allen, who wrote the decision in the instant case.

The decision in the instant case is not, as petitioners assert, in conflict with *Dornbos v. Block & Guggeneimer, Inc.*, 326 Mich. 626, which merely held that a claim for medical expenses under the Compensation Act must be made within the time provided for making a claim for compensation. The case did not involve the question of election of remedies. The instant decision is in harmony with *Schulmeyer v. Motor Freight*, 323 Mich. 142, rather than being in conflict with that decision as petitioner alleges. The Schulmeyer case holds that the test of whether an employee has elected to proceed for compensation is a question of the employee's intent and that he will be held to have intended the consequence of his own affirmative acts. In that case he had written the compensation commission asking to have weekly benefits, previously discontinued, renewed. There was no such conduct on the part of respondent.

The Trial Court and the Court of Appeals properly followed the Michigan law and Michigan cases.

Moreover, the statute involved herein was amended in 1952 so as to eliminate the election of remedies provision so that except for a few pending cases the issue raised is academic.

II.

RULING THAT 1952 AMENDMENT TO ELECTION OF REMEDIES PROVISIONS OF MICHIGAN WORKMEN'S COMPENSATION ACT IS RETROACTIVE SUPPORTED BY CASE LAW AND LEGISLATIVE HISTORY

The election of remedies provision of the Michigan Compensation Act was amended in 1952 so that the employee is no longer required to elect whether he will proceed for compensation under the Act or sue the third person, but may pursue both remedies, provided that in case of recovery against the third person, the employee must reimburse the compensation insurance carrier of the employer.

The Court of Appeals in the instant case ruled that this amendment was retroactive and applied to accidents occurring before its enactment. It should be noted that this ruling was not essential to the Court's decision since it had already held that there had been no election. The Court of Appeals' ruling on this question of the retroactive effect of the statute followed well established Michigan law that remedial statutes are to be given retroactive effect. *Judd v. Judd,* 125 Mich. 228; *Heineman v. Schloss,* 83 Mich. 153; *Nash v. Robinson,* 226 Mich. 146.

It is difficult to conceive of a statutory change that could be more remedial than one abolishing the requirement that a party elect between two remedies.

Moreover the legislative history of this amendment shows that the Michigan Senate as the Committee of the Whole first adopted a provision that the abolition of the election of remedies provision be prospective only and that the only employees "as shall not have heretofore elected a remedy," (*Journal of the Senate of the State of Michigan,* February 25, 1952, #34, p. 491), should benefit

from the 1952 amendment. The history of the Act shows, however, that the legislature refused to so limit the effect of the 1952 amendment and the amendment was passed without such restriction.

The case cited by petitioners in their brief, *Tarnow v. Railway Express Agency,* 331 Mich. 558, involved a 1943 amendment to the Compensation Act which, if given retroactive effect, would have destroyed rights the employee previously had. It was not a question of remedies.

There is no conflict between the decision in the instant case and that in *Nelson v. Westland Oil Company,* 181 F. 2d 371, C. C. A. 8. The Court there, as in the instant case, held that an amendment to the North Dakota compensation act was retrospective in effect and reversed the trial court. Since the case was sent back to the District Court, the Court of Appeals did not, as petitioner asserts, cast doubt on its holding, when it instructed the District Court to follow any decision by the Supreme Court of North Dakota, which might be handed down before the matter was disposed of. The instruction was merely a directive to the principle of *Erie v. Tompkins,* 304 U. S. 64, to follow state decisions on state law.

Moreover, the Court of Appeals for the Eighth Circuit was considering North Dakota law, a North Dakota statute with legislative history in the North Dakota legislature. The Circuit Court of Appeals for the Sixth Circuit in the instant case was considering Michigan cases, a Michigan statute, and its legislative history in the Michigan Legislature.

The question of whether the 1952 amendment to the Michigan Workmen's Compensation Act is retroactive is of no great significance since it can affect only the limited number of cases which were pending when the Act was amended.

III.

COURT OF APPEALS PROPERLY HELD THAT RESPONDENT NOT BARRED FROM RECOVERY BY DOCTRINE OF ASSUMPTION OF RISK

The *Restatement of Torts* §466 considers assumption of risk in those cases which do not involve master and servant, as a form of contributory negligence. The Michigan Supreme Court appears to have similarly characterized it. Thus in *Reedy v. Goodin*, 285 Mich. 614, the assumption of risk by plaintiff was treated by the Michigan Supreme Court as a form of contributory negligence. On page 619, the court said:

> "Defendant contends plaintiff was guilty of contributory negligence as a matter of law, that under the undisputed evidence plaintiff voluntarily assumed the risk of a known danger and brought himself within the operation of the maxim *volenti non fit injuria.*"

We are concerned only with a question of Michigan law in the instant case. The Court of Appeals seems properly to have chosen to rely upon the Restatement.

It is not quite clear whether petitioners object to the substance of the law as it is defined in the Restatement or to its application by the Court of Appeals in the instant case.

It is readily apparent that the Court of Appeals properly followed the rule of the Restatement if the following comparison of the language of the Court's opinion and the text is made:

COURT'S OPINION	RESTATEMENT (§466)
"intentional exposure of himself by a workman to a known danger."	"he should realize the danger involved."
	"must intentionally expose himself to this danger"

	"his intentional exposure of himself to the known danger must be unreasonable."
"must be so unreasonable that a reasonably prudent man in his position would not do so."	"In order that it may be unreasonable it is necessary that a reasonable man in his position would not expose himself to it."

IV.

EVERY STATEMENT OF FACT IN OPINION OF COURT OF APPEALS WELL SUPPORTED BY RECORD

The opinion of the Court of Appeals as originally filed contained one immaterial misstatement of fact. Considering that the record contained 480 pages, the accuracy of the Court's recitation of the facts is commendable. The misstatement was corrected following petitioners' Petition for Rehearing. The statements of facts which are not supported by the record are the statements in petitioners' brief.

The record supports the Court's statement that the crane was not moving when the respondent (plaintiff below) started to climb down. One of petitioners' (defendants below) own employees testified that the crane was still stationary even when the respondent (plaintiff) had started climbing down (R. 211).

There is likewise ample support for the Court's statement that "Presumably plaintiff's rope slipped over the side of the pick for two witnesses saw it hanging down from 8 to 10 feet before the crane started to move (R. 483.)"

Petitioners' own employee testified the rope was hanging down while respondent was climbing down (R. 91, 92, 105,

211). It is true that neither Mr. Buckner nor his fellow painter noticed the rope hanging down but both testified that it could have been hanging down and they not have noticed it (R. 317, 153). There was testimony that in dropping the 75 foot rope down unto the narrow aluminum platform, it was extremely difficult to get the whole of it on the platform (R. 266) and that respondent, Clarence Buckner, was at such an angle above the pick that he could not see whether all of the rope was on the pick (R. 317). There is absolutely no testimony to support an inference that Buckner kicked the rope from the platform as he climbed on it since petitioners' own employee testified that the rope was hanging down while Buckner was still climbing in the superstructure (R. 91, 92, 105, 211).

The respondent was not required to supply every fact by his own testimony alone, but was entitled to have the jury consider the testimony of all of his witnesses.

When the Court of Appeals in its opinion speaks of a lookout on the crane being better able to "foresee the possibility of an accident" than a lookout on the ground, it is discussing the relative advantages of the lookouts' positions and is not defining negligence. Thus the use of the word "possibility" is quite proper. There is support for the Court's conclusion that the lookout on the crane has the superior position in the testimony of the crane operator himself (R. 242, 243).

Petitioners object to the statement of the Court of Appeals that "Defendants had notice of the particular hazard because of the near accidents and dangerous situations which involved the crane shortly before this occurrence (R. 484)" as not supported by the record. The other near accidents, it is true, did not perhaps involve the identical rope nor did they happen in the identical place of the

instant accident, but they did involve ropes or other equipment getting entangled with the superstructure of the same crane (R. 119, 246, 334), and would seem to have given petitioner notice that workmen's ropes would become involved with the superstructure of the crane unless a lookout was kept. It must be remembered that the mill was in the process of construction and that there were employees of several sub-contractors, men in many different trades, all working in the mill building.

Contrary to petitioners' statement on page 18, there was no practice in the plant of stopping the crane while paint was being pulled up. The only testimony in this respect was that on other occasions while paint was being pulled up, it had been necessary to yell at the crane operator to stop the crane when he attempted to come through while paint was being pulled up (R. 333, 335).

There is likewise support for the Court's statement that Buckner was doing what any ordinary workman would have done under similar circumstances. Buckner and his partner were both painters experienced in doing construction work. They were following their usual practice (R. 257, 304). Their foreman testified that it was the only way the work could be done and that the rope was lowered in the only way it could be (R. 335).

V.

PETITIONERS' MOTION FOR MISTRIAL PROPERLY REFUSED WHERE MENTION OF INSURANCE INADVERTENT

During the course of the trial, in response to a question by his counsel as to what doctors he had seen, Mr. Buckner responded with the names of several doctors and concluded with the statement that the last one was the doctor for the insurance company. The remark was immediately stricken and the jury instructed to disregard it. No motion for mistrial was made until the close of the plaintiff's case. It is well settled by Michigan cases that mention of insurance is not basis for a mis-trial unless the subject is "deliberately injected into the case by counsel" or unless "improper use of it is made by counsel for the evident purpose of inflaming the passions of the jury." *Watroba v. City of Detroit,* 334 Mich. 182, at 191, 192. The trial court in the instant case found that there had been no bad faith on the part of the witness or counsel (R. 361). The cases cited by petitioners (Petition for Certiorari, page 20) recite the same rule of law as the Watroba case, *supra,* which strangely is the principal case relied upon by petitioners, yet it holds directly against their contention.

VI.

MOTIONS FOR DIRECTED VERDICT OF NO CAUSE OF ACTION AND FOR JUDGMENT NON OBSTANTE VEREDICTO PROPERLY DENIED

Under admittedly proper instructions, the jury by its verdict for the plaintiff (respondent) found plaintiff free from contributory negligence. Petitioners in their reply brief urge that respondent should be held guilty of contributory negligence as a matter of law because although he observed that the crane was stationary when he started

lowering the platform, he did not make any further observation before starting to climb down to the new location of the platform. Assuming that he should have made such subsequent observation, his failure to do so had no relation to the accident since petitioners' own superintendent testified the crane had not started to move when respondent was climbing down to the new location of the platform (R. 211). *Uzich v. E. & G. Brooke Iron Co.*, 76 Fed. Supp. 788, a Pennsylvania District Court decision, is essentially different from the instant case in that the plaintiff in that case chose a dangerous course of conduct when a safe method was readily available.

Contrary to the assertion made by petitioners (p. 21) respondent, although he had not actually seen a safety man on the crane, assumed that there was one (R. 307, 319). He further testified that the usual practice was to ring the bell on the crane before it was moved (R. 305).

Several of respondent's witnesses, all of them petitioners' employees, testified that the warning bell on the crane was not rung (R. 93, 94, 116, 154, 169, 170, 132, 265). Petitioners' employees further testified that it was the usual practice to have a safety man ride on the crane where he could see that there was nothing in the path of the crane (R. 136). The operator of the crane, because of the construction of the cab, could not see up into the superstructure (R. 242-243).

It should be noted that there is nothing mentioned by petitioners under Point VI as to why the Supreme Court shall be called upon to review this question. Apparently petitioners weren't able to think of any reason why review should be granted. Respondent is not able to think of any either.

VII.

LOWER COURTS PROPERLY REFUSED TO GRANT MOTION FOR NEW TRIAL

The chief reason urged here for a new trial is a claim that the verdict was excessive. The opinion of the Court of Appeals exhaustively considers this question and after reviewing the injuries sustained by the respondent concludes that the verdict was not excessive. Respondent sustained a comminuted fracture of the left femur; compound fracture of the right ankle which involved the tibia and fibula for about 3 inches which was very badly comminuted (R. 278); compression fractures of the fourth lumbar vertebra; damage to the nerves of the spinal cord which produced a partial paralysis of the urinary bladder and the lower bowel (R. 279-280); badly comminuted fracture of the left wrist. His right foot is like a claw. He has little feeling in it and cannot move the toes, foot or ankle at all (R. 272). He has no control over it whatsoever (R. 272). Mr. Buckner was in the hospital continuously from June 30, 1949 until February 12, 1950, with three special nurses for the first six months (R. 271). For the whole of the first seven months, he lay on his back unable to get out of bed (R. 270). In February of 1951 he had an operation on his spine in an attempt to obtain a return of bladder and bowel functions (R. 298) and to remedy the complete paralysis which affected the anal regions and the reproductive organs (R. 302). The operation was not successful because the paralysis was due to damage to the nerves in the spinal cord which were torn apart (R. 300, 301) and not just squeezed as had been hoped (R. 301). Respondent will have to be given an enema every day or every other day for the rest of his life (R. 274). Since he has no control over his bladder, he must be near a urinal

at all times (R. 274). In view of these injuries, the verdict seems no more than adequate. There neither is nor ever was any claim that the trial court's instructions relating to damages were improper.

The rule of damages which the petitioner's claim the District Court and the Court of Appeals ignored is the rule in death cases where there is no pain and suffering and the only item recoverable is the pecuniary loss to the next of kin. It has no application in cases where there is permanent injury, and pain and suffering, both past and future.

Petitioners mention other grounds for a new trial without discussing them. Each was argued extensively in the briefs filed in the Court of Appeals. The Court recites in its opinion that:

> "The numerous contentions with reference to error at the trial have been considered and are overruled. The trial court did not abuse its discretion in denying the motion for new trial. * * * We find no reversible error in the admission of the testimony, in the conduct of the trial or in the charge of the court."

There is no reason to believe that it did not do so.

VIII.

NO CONDUCT ON PART OF COURT OF APPEALS OR DISTRICT COURT WHICH CALLS FOR EXERCISE OF SUPREME COURT'S POWER OF SUPERVISION

The conduct of both the District Court and of the Court of Appeals was in all respects proper and judicious. Reference is made by petitioners to the "comments" of these courts but no particular comment is complained of. Respondent knows of no remark or ruling by either court which it could even be pretended was prejudicial.

The case of *Quercia v. U. S.*, 289 U. S. 466, cited by petitioners involved a situation so remote from that in the instant case that comparison is impossible. That case was a criminal action in which the trial court instructed the jury that the defendant's conduct during the trial, i.e., wringing his hands, was in the judge's opinion, evidence that he was guilty of the offense charged. The Supreme Court held that the accused had not had a fair trial. In the instant case the record discloses that the conduct of the trial was fair in all particulars. Careful consideration was given to petitioners' requests for instruction (R. 361-375).

It is certain that petitioners' "Petition for Rehearing" in the Court of Appeals was carefully considered since the minor misstatement of fact in that court's opinion which was pointed out therein was promptly corrected.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

JAMES A. MARKLE,
CORNELIA GROEFSEMA,
Counsel for Respondent.

Dated: July 10, 1953.